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THE STRUCTURE AND PROCESS OF NEGOTIATIONS AT THE WORLD INTELLECTUAL PROPERTY ORGANIZATION*

GEOFFREY YU**

When Professor Dinwoodie handed me the sexiest subject in the program, I decided that I would thank him, show my appreciation, by sending him this diagram.¹ When he received it, he said, “Dear me! I hope you’re not going to walk us through this organigram.” What he didn’t say was, “I mean, it would be too tedious for words.” I also didn’t tell him, “Well, that is exactly what I plan to do.” So, in all fairness to Professor Dinwoodie, I thought I would begin by telling you a story. It’s too early after lunch; some of you are half awake. So maybe this story will have the effect of helping you out.

There was a very poor woodcutter who, to go to work every morning, had to cross a very narrow wooden bridge, which was strung above a swift river. Our friend didn’t swim. One morning as he was crossing the river, he stumbled and his axe, which was the means of his livelihood, fell and disappeared into the water. The poor man did not know what to do, fell to his knees, and cried out, “God, God help me!”

A voice came out from the sky and said, “What can I do for you my son?”

And he said, “Well I’ve lost my axe. What am I going to do? I will starve—my family too.”

So a huge hand came out, actually an arm with a hand attached at the end, came out of the sky and went into the waters and came out with a silver axe. “Is this your axe my son?”

“No, no it isn’t.”

The hand went in a second time and came out with a golden axe.

“Is this your axe?”

“No, it is not.”

* Transcription of the presentation given at the Chicago-Kent Symposium on Intellectual Property, Trade and Development: Accommodating and Reconciling Different National Levels of Protection (Oct. 13, 2006).

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1. Reproduced at the end of this transcript.

The hand went in a third time and this time it was the right axe. The man was so thankful that he thanked God, and God said, "Since you're such an honest man, my son, I will let you have the other two axes as well."

Several months later, our friend was once again crossing the bridge. This time he was accompanied by his wife who had decided to spend the day with him. She had prepared a very nice lunch. As they crossed the bridge, she stumbled, fell headlong and disappeared into the waters. Our poor friend was even more desperate than he was before. He cried out and again there was a voice.

Again, the woodcutter answered, "Well, this time I've lost my wife. It is the most terrible thing that could happen to me."

And a huge arm came out, went into the waters, and came out with Jennifer Lopez.

"Is this your wife?"

The woodcutter looked up and said, "Yes."

God was, as you can imagine, terribly upset. "This is not possible, I thought you were an honest man."

And he said, "But I am"

"How?"

"Well, you see, if I had said no, you would put your hand in and come out with Madonna, and if I said no, well, maybe I would get my wife back the third time. God, I am a very poor man, I can't afford so much intellectual property."

So, anyway, what I was assigned to say today is about the organization and management of the process of international discussions and negotiations at WIPO. Not a terribly interesting subject for some of you because you are more interested in the outcome, rather than in the process. But I think that it is nonetheless useful for you to have an idea of the process because, in more ways than one, and to a greater extent than you might suspect, the process does contribute to the eventual outcome in many different ways, some more obvious than others.

So, in order to have an understanding of the process naturally, some ground rules have to be established and a certain structure must be in place, because the structure and the ground rules will ensure that there is order, that there is predictability, that there is a minimum understanding of what can be done and what cannot be done and how decision making is going to be guided from one stage to another. Also, it is very important that you have transparency so that people know what those rules are, what the organs are that they will be participating in and how one organ relates to another, and where and when the ultimate decision-making stage will be

reached. So, for that reason, some structure of the kind that you see in the organigram at the World Intellectual Property Organization is essential.

Now I'm not going to walk you through this, because I would like to abide by Professor Dinwoodie's word. This is simply to show you that at the top of the organigram, you have the WIPO General Assembly. That is the most important and highest level decision-making body.

Below you have a number of other bodies. To the left when you're looking at the screen you have the WIPO Conference and to the right you have the Coordination Committee. Now, these are used for normal decision making when WIPO has its meetings in Geneva. I'm not talking about special occasions, such as a diplomatic conference that leads to the creation of a new treaty. I understand some of my commentators will be talking about that to supplement what I have to say. But what is important, what you should know is, that before we reach the stage of actually convening a diplomatic conference, we have to go through the process in Geneva, and that process in Geneva will involve precisely some of the bodies you see here on the organigram.

The most important ones that you really should be looking at are the Committees, which, if you look to the screen, is the third one from your left. These are the Committees that specialize in certain subjects. There is a Committee dealing with copyright and related rights. There is a Committee dealing with trademarks, industrial designs, and geographical indications. There is another Committee dealing with patents. These are the three essential Committees that discuss and review existing international norms embodied in treaties that are administered by the Organization. They will be the ones examining whether some of the existing treaties need to be revised or supplemented, taking into account the latest developments in the world. From time to time, member states may feel that some of the treaties need to be brought up to date, or that new standards and understanding will help to address developments that were not foreseen or reflected in existing treaties.

Now, to the extreme right, you will see a box that describes a couple of special Committees. The most important one that we should be looking at today would be the IGC, which is the Intergovernmental Committee dealing with genetic resources, folklore and traditional knowledge. In addition, there is a Provisional Committee, which deals with the entire issue of the development agenda. The development agenda discussions, incidentally, are not discussions that are expected, at least at this stage, to lead to any eventual treaty. In fact, these discussions are not taking place with the

expectation of such a thing happening, unlike some of the other Standing Committees.

The Standing Committees, when they finish their work, will report and make recommendations to the General Assembly. The people participating in the Standing Committees would be the representatives of the member states of WIPO. We have 184 countries that are members of the Organization today. They are all invited to each and every one of these sessions. In addition, we have something like 250 non-governmental organizations that will also be invited. They come from different fields, whether industry-related or professional trade-related associations, or they could be international civil society organizations. At WIPO, we are very open, unlike the World Trade Organization, where the discussions are purely among the participating, shall we say, economies—participating members of the World Trade Organization. In our case we also bring on non-state actors. In addition, we invite international intergovernmental organizations from the UN family, such as the World Health Organization, World Trade Organization, UNESCO, and so forth, as well as other IGOs, as we call them, that would be interested in one or another aspect of our work.

Now, the two categories, the IGOs and the NGOs have observer status, which means that although they are present in the very room where the member states are also seated, they do not have the capacity to make proposals; proposals can only come from governments. But they are able to speak, and their views are often listened to very carefully, and often taken into account and responded to even, by the representatives of our member states. The same IGOs and NGOs can circulate papers, but the papers would be circulated outside of the meeting room, as opposed to member states that are able to circulate their proposals and their papers inside as conference room documents. So, this therefore is the essential structure and hierarchy.

Now what is the difference between people taking part in a Standing Committee and the people taking part in the General Assembly, which, every September of each year, receives the output or the outcome—the results—of the Standing Committees that meet before September? Everything that comes out, whether they are positive results or sometimes no results, from a Standing Committee will go before the General Assembly which always meets in the fourth week of September. On the face of it, they're all the same countries, same IGOs, same NGOs.

So, what is the difference? Well, this is where we come to the process, and the differences come in the following way. First and foremost, there is

a tendency, although I am generalizing, that the people attending the Standing Committees are people coming from the capitals who have technical expertise in the subject with which the Standing Committee deals. They tend to be, therefore, people at the working level. By which I mean, for instance, if the Standing Committee on Patents is meeting, there is likely to be a head of department in charge of patents or sometimes a senior patent examiner who would be representing his country to discuss the issue. However, when we come to the General Assembly, we find that, as a rule, the participants are the heads of the national or regional intellectual property offices themselves. So it's already at a very different level. A head of the patent office, of course, has a wider view of all issues and not just of patents alone.

Secondly, whereas in a Standing Committee it is very unlikely that you would have senior diplomats who are based in Geneva participating, in the General Assembly you are likely to find many ambassadors who come from time to time, or who sit in the background and give directions to the delegates that are speaking from his country's Geneva-based mission. So there is the difference, therefore, of levels, but at the same time, there will be more people coming to the Assembly as compared to a Standing Committee, which tends to draw smaller numbers of people. Not least because, under the WIPO scheme of things, for two of the treaties that we administer, namely the Patent Cooperation Treaty and the Madrid System for the International Registration of Trademarks, we finance the participation of one participant per country member of each of the two treaties. Therefore, you suddenly find at the General Assembly many more people coming from the capitals at the level of heads. And very often many of these people are from the developing countries. Therefore, if you like, because the membership and the participation is different, the dynamic also changes. Whereas the issues are often technical in nature in the Standing Committees, in the General Assembly political considerations will come into play.

The other aspect is that the General Assembly considers all issues, so it looks at what has come out of the committee dealing with the patents, the committee dealing with copyright, with the development agenda. And suddenly it is no longer an issue in isolation, but a basket of issues. Therefore, whatever decision that the General Assembly will decide to make to move certain agenda items forward and the international process forward, they have to bear in mind all the factors and everything that is happening and has happened in the various fields. And therefore the balancing and the negotiation as to how things will move forward in one area rather than another becomes more complex and more interesting. There is, therefore, in

the background some negotiation and consultations of the following kind: if I give you a certain thing in this area, I expect movement in the other area—which would not have happened otherwise in the individual Standing Committees. So this is important.

Also, the Chair of the General Assembly is not the chair that would be presiding over the each of the Standing Committees. So you have a new person suddenly coming into play who will have a different way of looking at things compared to the Chair of this or that Standing Committee. And here again, the Chair of the General Assembly is an ambassador, unlike the Chairs of the Standing Committees, who could be just technical experts.

Furthermore, I would like to say that whereas the Director General of the Organization is often absent from the discussions in the Standing Committees, he is present very much in the General Assembly. And given his stature and the fact that he is leader of the Organization, he is considered to be someone who will play an important role in finding equilibrium and the right approach so that the whole membership of the Organization moves ahead with the program of work. What he suggests and what he would have to say at crucial moments in the discussions becomes important, sometimes leading to something that would not otherwise happen. So, depending on the organ or body, the whole dynamics will change, and it becomes much more complex and, at the same time, very interesting to observe and to participate in.

Last but not least, you have the role of the Secretariat. The Secretariat's role is to facilitate and provide information, but the Secretariat sometimes, in an indirect way, also helps to shape the outcome of events. First and foremost because the Secretariat is the one that proposes through the Director General the program and budget for the Organization, meaning that he will propose how much money is to be given to each area of work, and how often meetings would take place. This, therefore, will have an effect on the process because member states, as a rule, try to respect the proposals of the Director General. The Director General states, "This year, given the resources available, I will only propose two meetings dealing with a given subject." It is very unusual for the members to say "No, I think we should have three meetings instead of two." So the mere fact of saying, "We're going to have two meetings this year," already, if you like, provides a framework for how things are going to happen in the course of a twelve-month period.

Some countries are beginning to realize this and say, "I wish I had more say in the process of preparing the budget and the program. And, therefore, we want to take away from the Secretariat this indirect role that it

is playing in shaping international discussions.” It remains to be seen, whether it will in fact happen, because many countries also consider such an approach could amount to micromanagement. Many other countries say, “We should not interfere with the way that the Director General has been running the Organization, because that is not a good thing for us, and we do not have the capability and expertise as national delegates to deal with this issue.” These different schools of thought are currently being discussed at WIPO.

There are two other worthwhile things I would like to say. First, discussions are taking place not always among all 180 developed member countries and the IGOs and NGOs concerned. To make life more streamlined and simpler, sometimes discussions take place in groups. We cannot always bring together so many countries in one room, and some countries may not be very interested in an issue. Therefore in WIPO there is the standing arrangement of regional groups—geographical groups—of which there are seven: the African group; Asian group; Latin American and Caribbean group; and then what we call the Group B countries, which are the developed countries, not just those based in Europe or North America, but also Japan, Australia, New Zealand; then you have the countries of eastern Europe and Baltic countries; you have the central Asian and caucas countries; and China, because of its size, is considered a group by itself, although it is only one country.

So sometimes the groups meet and if it is possible to find consensus within the groups, we do not have to deal with the whole membership of the Organization. But this is not often possible because within groups there is no agreement on what the group position should be. Sometimes you have the emergence of sub-groups. For instance in the Asian group, you have ASEAN, the Association of Southeast Asian Nations, a grouping of ten countries where it is easier to forge consensus than within the larger group of Asia. Again, in the case of Asia, there is the SAARC, a South Asian group, although that is a group that is much less active compared to ASEAN. Recently, what has happened when we have discussed the development agenda is that there is a cross-cutting—meaning across geographical lines—group of sixteen countries called the Friends of Development. They are all developing countries, and they have been forging a kind of identity of their own. They have been trying to say that they should be put on equal footing as the regional groups, but that is not yet the case. Last but not least, a very important emerging group is the group of the least-developed countries. As you know, at the WTO they had been given special treatment, quite rightly. In WIPO, they consider that their concerns

may not always coincide with those of the developing world in general. In this way, they have become an important group.

The other thing I would like to say to end my presentation is that traditionally in WIPO, we try to avoid voting because it is divisive and it shows up that an idea is not embraced by everybody. So we prefer to go the route of consensus building. The only difficulty with consensus building is that different people have different understandings of what is consensus: whether it means that one person or five persons can hold up discussion, or whether we can live with a situation where more than five members are unhappy, but the majority would be happy and, therefore, there is consensus. This is a shifting definition and we have so far avoided the pitfall of trying to define it; we have managed to live with it reasonably well. For us at the international level, getting everyone aboard is still the best approach.

